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Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,
Petitioners.
v.
NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

OPERATION RESCUE,
Petitioner.
v.
NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amicus curiae will address the following question as presented in Petition for a Writ of Certiorari Nos. 01-1118 and 01-1119:

1. Whether the "obtaining of property" element of the federal extortion statute, which is a predicate offense for civil RICO, may be satisfied, as the Seventh Circuit held, merely by a showing of "interference with the rights" of another?

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a non-profit civil liberties education and legal defense organization which provides education and legal representation regarding the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the United States Constitution. Attorney Mathew D. Staver and Liberty Counsel have been actively engaged in defending these rights throughout the nation.

Liberty Counsel defends the right of pro-life demonstrators such as the petitioners in this case, and is concerned about the Seventh Circuit's treatment of the questions presented in this case. Allowing the Seventh Circuit's opinion to stand will cause grave harm to the Free Speech and Free Exercise rights of individuals similarly situated to the petitioners in this case.

Liberty Counsel defends the right of all people to participate in constitutionally protected protest. If the Seventh Circuit's decision is affirmed, such protest activities will be chilled by an inordinate threat of civil RICO litigation arising from the Seventh Circuit's overly broad interpretation of the scope and purpose of the Hobbs Act.

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent are on file with this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The Crime of extortion as used in the Hobbs Act requires the extortionist to obtain property from the victim. The predicate act of extortion for RICO liability must therefore require the extortionist to obtain property as opposed to merely causing loss to or interfering with the rights of the victim. By requiring an alleged extortionist to "obtain" property in order to violate the Hobbs Act, this Court will bring the Hobbs Act within its intended reach under common law and New York law history, and at the same time salvage the right to free speech.

ARGUMENT

I.

THE CRIME OF EXTORTION AS USED IN THE HOBBS ACT REQUIRES THE EXTORTIONIST TO OBTAIN PROPERTY FROM THE VICTIM.

The term "extortion" as used in the Hobbs Act requires the extortionist to "obtain" property from the victim. To be liable, the extortionist must do more than merely cause loss to, or interfere with the rights of the victim.

Passed in 1946, the Hobbs Act reads, in relevant part:

> (a) Whoever obstructs, delays, or affects commerce . . . by extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty (20) years, or both.[2]

The Hobbs Act then defines "extortion" as follows:

> The term "extortion" means the obtaining of property from another, with his consent,

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[2] *See* 18 U.S.C. §1951(a).

> induced by wrongful use of actual or threatened force, violence, or fear, under color or official right.[3]

This definition of extortion was drawn from the predecessor to the current Racketeering Corruption Organization Act (hereafter "RICO"), the Anti-Racketeering Act of 1934 ("1934 Act").[4] The 1934 Act was largely modeled after the extortion definition contained under then existing New York law.[5] The Hobbs Act sponsor, Representative Hobbs, acknowledged the connection between the 1934 Act and then existing New York law in 1945 during debates preceding the passage of the Hobbs Act.[6] As such, the language used to define extortion is

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[3] *See* 18 U.S.C. §1951(b)(2).

[4] *See* 18 U.S.C. §§ 420(a)-(e) (1934).

[5] The Senate Judiciary Committee intended the 1934 Act to be aimed at persons who committed extortion. See S. Rep. No. 73-532, at 1 (1934).

[6] The language used to define extortion in the Hobbs Act is the same language that was used under then existing New York law. *See United States v. Jackson,* 180 F.3d 55, 69 (2d Cir. 1999); 91 CONG.REC. 11900 (1945) (Statement of Rep. Hobbs) ("The definitions in this bill are copied from the New York Code substantially."); N.Y. PENAL LAW §850 (Consol. 1930) ("Extortion is the obtaining of property from another ... with his consent, induced by wrongful use of force or fear, or under color of official right."); Note, *Protestors, Extortion and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 707 (Dec. 1999).

largely the same under both the Hobbs Act and then existing New York law, i.e., the extortionist must "obtain" "property" from the victim.[7]

When Congress uses a term of art such as "extortion," it is presumed to retain its common law meaning. This Court should construe the Hobbs Act in accordance with its common law meaning.[8] Similarly, when Congress borrows statutory language from another jurisdiction, courts should construe that statute in conformity with the jurisprudence from the jurisdiction in which it was borrowed.[9] Other courts have also

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[7] In *Evans v. United States*, 504 U.S. 255 (1990), this court interpreted the public misconduct portion of the Hobbs Act in conformity with its common law definition. Since there was nothing in the statutory text or legislative history to the contrary, this court construed that portion of the Hobbs Act in conformity with the common law definition. *Id.* at 264. Similarly, there is nothing in the statutory text or legislative history that provides the judiciary with a conclusion other than that Congress intended for "obtaining" under Hobbs Act extortion to mirror the common law definition which required that an extortionist "get" property.

[8] As Justice Felix Frankfurter advised, "[i]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

[9] *See Evans v. United States*, 504 U.S. 255, 259-60 (1992) (stating that "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from

acknowledged that the Hobbs Act had its origin in the laws of New York and in the common law crime of extortion.[10]

Both the common law and New York law definitions of extortion required that the extortioner "obtain" or "get" property.[11] This Court should interpret "extortion" to require the extortionist to "obtain" or "get" property from the victim. Anything less ignores the history of the term as used in the Hobbs Act. This Court has at least once impliedly used the terms "obtain" and "get" interchangeably.[12]

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which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.") When a legislature borrows statutory language from another jurisprudence, that language should be construed in accord with the other jurisdiction's jurisprudence. *See also Willis v. E. Trust & Banking Co.*, 169 U.S. 295 (1897); *Morissette v. United States*, 342 U.S. 246, 263 (1952).

[10] *See United States v. Nedley*, 255 F.2d 350 (1958).

[11] *See Printers II, Inc. v. Professionals Publishing, Inc.*, 615 F. Supp. 767 (S.D.N.Y. 1985) (reasoning that extortion requires a taking of property); *People v. Squillante*, 185 N.Y.S.2d 357 (App. Div. 1959) (reasoning that extortion implies that the person obtaining must actually receive property).

[12] *See also United States v. Green*, 350 U.S. 415, 419 (1956) (arguably using the term "obtain" and "get" interchangeably).

II.

THE PREDICATE ACT OF EXTORTION FOR RICO LIABILITY MUST REQUIRE THE EXTORTIONIST TO OBTAIN PROPERTY AS OPPOSED TO MERELY CAUSE LOSS TO OR INTERFERENCE WITH THE RIGHTS OF THE VICTIM.

The Seventh Circuit in *NOW v. Scheidler*,[13] severely weakened the First Amendment and significantly expanded RICO liability by eliminating the requirement that a defendant "obtain" property from the victim in order to commit the crime of extortion under the Hobbs Act.[14]

To reach its conclusion, the *Scheidler* court confused "coercion" with "extortion".[15] The Hobbs Act is rooted in

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[13] *See* 267 F.2d 687 (7th Cir. 2001).

[14] The Hobbs Act is one of several predicate acts to 18 U.S.C. §§1861-68, or RICO. The Hobbs Act prohibits "extortion." The Hobbs Act defines "extortion" as: "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *See* 18 U.S.C. § 1951 (b)(2).

[15] Coercion was not a common law offense, but rather a creature of statute. The Model Penal Code ("MPC") defines "coercion" as the use of threats with the purpose of "unlawfully restricting another's freedom of action to his detriment." MODEL PENAL CODE AND COMMENTARIES §212.5 cmt. 2, at 264 (1980). In contrast, "extortion" is contained in the MPC's consolidated

the common law.[16] At common law, a victim had to lose something of tangible economic value, and the extortionist had to "take" from the victim.[17]

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offense of "theft" and is restricted to the criminal who "obtains property of another by" threats. *Id.* § 223.4 cmt. 1, at 203. *See also* G. Robert Blakey & Kevin Roddy, *Reflections on Reeves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO,* 33 AM. CRIM. L. REV. 1345, 1660 (1996) ("[O]btaining of property distinguishes extortion from coercion as coercion involves the restriction of another's freedom of action by threat.").

[16] Federal extortion law is rooted in the common law. *See Evans v. United States,* 504 U.S. 255 (1992) (citing James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act,* 35 UCLA L. REV. 815 (1988)). This Court's jurisprudence provides that a statutory term is presumed to maintain its common law meaning. *Id.* at 260.

[17] Amici will not address the interpretation of "property" that includes both "tangible" and "intangible" within its ambit. At common law, an extortionist took either money or some valuable thing. Whether or not it was proper for the courts to interpret intangible property within this definition is debatable. One view, however, is that including intangible property withing the definition of "property" was reasonable and necessary because of the changing nature of wealth in modern society. The recent construction of the term "obtain" by some courts is not reasonable, however, for while the meaning of "property" has an ever changing definition, the meaning of "obtain" has a definite meaning in the English language. These reasons arguably explain why Congress did not define its meaning in the Hobbs Act. "Obtain" means "to acquire," "to procure," or "to get hold of." *See* BLACK'S LAW DICTIONARY 972 (5TH ed. 1979); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2000).

Notwithstanding the common law meaning of "extortion", some courts, beginning with *United States v. Provenzano*,[18] through *Northeast Women's Center v. McMonagle*,[19] to the Seventh Circuit's decision in *Scheidler*, have eroded both the common law definition and Congressional intent by eliminating the requirement that the extortioner "obtain" or "get" property. The Seventh Circuit merely required a showing that the defendant cause a loss to or interfere with the rights of the alleged victim. Such a showing is not "extortion."

Misunderstanding of Hobbs Act extortion is in part traced to the application of cases involving the inchoate criminal offenses of attempted extortion and conspiracy to commit extortion, which the Hobbs Act also prohibits, to cases involving allegations of the completed crime of extortion.

The Seventh Circuit in *Scheidler* misunderstood the significance of the inchoate offenses proscribed by the Hobbs Act as evidenced by its reliance on those cases for its holding.[20] A defendant charged with attempted extortion or

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[18] 334 F.2d 678 (3d Cir. 1964).

[19] 889 F.2d 466 (3d Cir. 1989).

[20] *See Scheidler*, 267 F.3d at 709 (*citing Stillo*, 57 F.3d at 559). *See also United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987) (stating, in dicta, that "[l]oss to the victim is the gravamen of the offense," where defendant *attempted* to extort money by ordering victim to deposit one million dollars into a third party's account); *United States v. Stillo*, 57 F.3d 553, 556 (7th Cir. 1995) (involving defendants that were indicted for, among other crimes, *conspiracy* to commit

conspiracy to commit extortion has not actually "obtained" or "acquired" anything. The defendant's argument that he or she has not "taken" or "gotten" "property" under the Hobbs Act is irrelevant. These crimes are by their very nature inchoate. Thus, relying on a decision that arose in the context of an inchoate offense, and applying that dicta to a case where a defendant is charged with an actual, completed crime, in the end creates a straw man.

Some of the misunderstanding has also arisen when courts apply dicta from prior decisions out of context.[21] The Seventh Circuit and appellate courts applying its reasoning, have shown a propensity to apply dicta from prior decisions

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extortion); *United States v. Frazier,* 560 F.2d 884, 887 (8th Cir. 1977) (stating, in dicta, that the "gravamen of the offense is loss to the victim," where a defendant *attempted* to extort $150,000 from a bank by having that money deposited into a third party's account).

[21] *See Scheidler,* 267 F.3d at 51 ("[A]s a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.") *See contra United States v. Panaro,* 266 F.3d 939, 948 (9th Cir. 2001) ("[U]nder the Hobbs Act, extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone – either the extortioner or a third person – must receive the property of which the victim is deprived . . .."); *United States v. Nedley,* 255 F.2d 350 (3d Cir. 1958) (finding evidence insufficient to convict defendant under the Hobbs Act based on allegations that the defendant attempted to put the victim out of business; the government needed to show that the defendant obtained property to satisfy the Hobbs Act).

without regard for the facts in which those decisions arose.[22] For instance, the phrase "the gravamen of the offense is loss to the victim" has been repeated and misapplied so many times that courts have not appreciated how this phrase, standing alone, misinterprets the Hobbs Act. These courts have not appreciated the true nature of "extortion," and have essentially created a new crime that bears no resemblance to extortion under the Hobbs Act.

The text of the *Scheidler* opinion evidences this point. In response to Petitioners' argument that they were not liable under the Hobbs Act because they did not "obtain" "property" from the Respondents, the Seventh Circuit stated:

> In a similar vein, the Defendants assert that, even if "property" was involved, the Defendants did not "obtain" that property; they merely forced the Plaintiffs to part with it. Again, this argument is contrary to a long line of precedent in this Circuit, holding that "as a legal matter," extortionists can violate the Hobbs Act without either Seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim

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[22] *See United States v. Green*, 350 U.S. 415 (1956). In *Green*, this Court held that a union and union officials could violate the Hobbs Act by attempting to obtain benefits for union members. In dicta, this court stated that "extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property." *Id.* at 420. This Court did not say, however, that it was unnecessary for property to be obtained.

is all that is required.[23]

The Seventh Circuit's reference to a "long line of precedent" is misguided. This statement is based on its own decision in *Stillo* that largely cites and applies dicta from prior decisions. In *Stillo,* the Seventh Circuit relied on *Lewis*[24] for the proposition that a "loss to, or interference with the rights of, the victim is all that is required" to violate the Hobbs Act.[25]

This quotation, dicta in the decision, involved a factual scenario different than the instant case, i.e., the defendants in Stillo actually obtained, and attempted to obtain, property.[26] The Seventh Circuit applied this dicta to Petitioners, forgetting to independently consider the "obtain" element of the Hobbs Act or consider the facts of

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[23] *See Scheidler,* 267 F.3d at 709 (*citing Stillo,* 57 F.3d at 559). Abortion is not a property right, contrary to the reasoning of the Seventh Circuit in *Scheidler. See Libertad v. Welch*, 53 F. 3d 428 (1st Cir. 1995) (reasoning that a patient who was prohibited from entering a business for an appointment did not have standing to sue because she had not suffered an injury to "property").

[24] 797 F.2d at 358.

[25] *See Stillo*, 57 F.3d at 559.

[26] A review of *Stillo* demonstrates that the defendants were indicted and convicted of, among other things, conspiracy to commit extortion, an inchoate offense. They both were engaged in a several year pattern of obtaining bribes in exchange for arranging the outcome of criminal prosecutions. *See Stillo,* 57 F.2d at 555-56.

th- ses that it relied on for its decision.[27] In the case *sub ju .ce*, the Petitioners did not "obtain" Respondents' property, whether property is defined as tangible, intangible, or a liberty interest. Indeed, the Petitioners sought the opposite result: they did not want Respondents' "property".

In *United States v. Panaro*,[28] the Ninth Circuit addressed the question of whether a defendant is liable for extortion under the Hobbs Act if the defendant merely

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[27] *See United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995) (stating, in dicta, that the "gravamen of the offense is loss to the victim," where defendants forced various companies to make contributions to third party organizations) (*citing United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978)); *United States v. Carlock*, 806 F.2d 535, 555 (5th Cir. 1986) (stating, in dicta, that the "gravamen of the offense is loss to victim," where a defendant ordered a victim to make payments to a third party);. *Lewis*, 797 F.2d at 364 (stating, in dicta, that "[l]oss to the victim is the gravamen of the offense," where defendant attempted to extort money by ordering victim to deposit one million dollars into a third party's account) (*citing Frazier*, 560 F.2d at 887); *Santoni*, 585 F.2d at 673 (stating, in dicta, that the "gravamen of the offense is loss to the victim," where defendant forced victim to award contract to a third party) (*citing Frazier*, 560 F.2d at 887); *Frazier*, 560 F.2d at 887 (stating, in dicta, that the "gravamen of the offense is loss to the victim," where a defendant attempted to extort $150,000 from a bank by having that money deposited into a third party's account) (*citing United States v. Jacobs*, 451 F.2d 530, 535 (5th Cir. 1971); *United States v. Lance*, 536 F.2d 1065, 1068 (5th Cir. 1976) (stating, in dicta, that the "gravamen of the offense is loss to the victim," where a defendant extorted money from a victim).

[28] 266 F.3d 939 (9th Cir. 2001).

"deprived" a victim of property. The Ninth Circuit held that an extortioner or a third party must actually *receive* property to be liable under the Hobbs Act.

This case is instructive for two reasons. First, it correctly interprets the plain language of Hobbs Act. Second, it correctly analyzes and applies past case law regarding the Hobbs Act. For instance:

> The four conspirators sought not only to put Blitzstein out of business, but actually to get his business interest for themselves. That is important with regard to the "obtaining" element of the Hobbs Act. Of course, "it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of extortion or any benefit therefrom. The Hobbs Act does not require such proof." But *under the Hobbs Act, extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone – either the extortioner or a third person – must receive the property of which the victim is deprived.*[29]

Panaro reconciles the land mine of prior cases

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[29] *Id.* at 934 (*quoting United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir. 1964), *cert. denied*, 379 U.S. 947 (1964)) (emphasis added). *See also United States v. Hyde*, 448 F. 2d 815, 843 (5th Cir. 1971) (stating that "[o]ne need receive no personal benefit to be guilty of extortion."); *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958) (finding allegation that the defendants tried to put the victim out of business insufficient to show "obtaining" for purposes of robbery under the Hobbs Act).

regarding Hobbs Act extortion, and applies that law in a manner that comports both with the plain language of the statute and Congressional intent. Appellate courts such as the Seventh Circuit in *Scheidler* have failed to adequately appreciate the nature of extortion, or, alternatively, in their zeal to find a remedy for a victim of distasteful protest activities, these courts have "let the ends justify the means."[30] Failure to require that the defendant "obtain" property from the victim to commit the crime of extortion will result in untold damage to the First Amendment.[31]

Federal courts interpreting the "obtain" element of extortion under the Hobbs Act have historically required the extortioner to actually "get" or "obtain" "property" from a victim before RICO liability would attach.[32] However, several decisions, often cited out of context, have set the stage for the current problem.

In *United States v. Green*,[33] a union and a union

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[30] *See United States v. Jackson*, 180 F.3d 380 (2d Cir. 1999) *with United States v. Arena*, 180 F.3d 55 (2d Cir. 1999). In *Jackson*, the Second Circuit relied on the common law tradition and Hobbs Act history (New York law) when construing a federal "extortion" statute. *Jackson* was not an abortion related case. By way of contrast, the Second Circuit in *Arena* relied on a Webster's Dictionary instead of a review of the common law tradition or Hobbs Act history (New York law) when construing the Hobbs Act. *Arena* was an abortion related case.

[31] *See* Note, *Protestors, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 704-712 (1999).

[32] *See supra*, note 10.

[33] 350 U.S. 415 (1956).

representative were indicted and convicted for Hobbs Act extortion. The trial judge set aside the verdict due to a lack of evidence that the defendants actually "obtained" "property" from the employer. This Court reversed the lower court's decisions and held that extortion under the Hobbs Act "in no way depends upon having a direct benefit conferred on the person who obtains the property."[34] In *Green*, a third party "obtained" the subject property.

Notwithstanding subsequent judicial misuse of *Green's* dicta, this Court recognized and applied the "obtain" element of the Hobbs Act. This Court held that culpability under the Hobbs Act exists if a third party "obtains" property; the defendant need not be the person that obtains the property.

Green stands for the proposition that someone must obtain property to violate the Hobbs Act. In *Green*, the defendants "obtained" property for third parties, which is a reasonable interpretation of "obtain" under Hobbs Act extortion. However, some appellate courts have misread *Green* to eliminate the "obtaining" requirement altogether.

In *United States v. Provenzano*,[35] the defendant was convicted of extortion under the Hobbs Act for threatening certain victims into paying money, i.e., "property," to another individual. The defendant, relying on *Green*, argued that he did not receive any "indirect" benefit from these payments.[36] While the Third Circuit did state, in dicta, that "[t]he gravamen of the offense (Hobbs Act extortion) is loss to the victim," it ultimately held:

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[34] *Id.* at 420.

[35] 334 F.2d 678 (3d Cir. 1964).

[36] *Id.* at 686.

> In view of the foregoing authorities we hold that it is not necessary to prove that the extortioner himself, either directly or indirectly, received the fruits of his extortion or any benefit therefrom. The Hobbs Act does not require such proof. It is enough that payments were made at the extortioner's direction to a person named by him.[37]

The most disturbing factor of *Provenzano* is the statement, taken out of context by subsequent courts, that the "gravamen of the offense is loss to the victim." This statement did not reflect the holding of *Provenzano*. The statement is, in part, correct; however, taken alone it is not a correct statement of Hobbs Act extortion law, as many courts have held.

In *Northeast Women's Center, Inc. v. McMonagle,*[38] the Third Circuit held pro-life demonstrators liable to abortion clinic owners under RICO. In *McMonagle*, an abortion clinic sued twenty six pro life demonstrators for activities arising from four protests at the clinic. At trial, the plaintiff presented evidence that showed that the defendants trespassed on clinic property on four different occasions. Defendants made their intentions very clear that they wanted to "shut down" the Plaintiff's abortion clinic.[39]

McMonagle is problematic for a variety of reasons. First, the Third Circuit ignored the "obtain" element of the Hobbs Act, notwithstanding the fact the defendants' raised

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[37] *Id.*

[38] 868 F.2d 1342 (3d Cir. 1989).

[39] *Id.* at 1346.

the issue on appeal.[40] The Third Circuit's silence on this issue is both perplexing and disturbing. Second, the Third Circuit ignored common law and statutory precedents, i.e., New York law, of the Hobbs Act, notwithstanding the fact that Third Circuit precedent analyzed this exact issue in *United States v. Nedley*[41] and *United States v. Sweeney*.[42]

Finally, the Third Circuit allowed the concept of "intangible" property rights to abrogate the requirement that an extortioner "obtain" property under the Hobbs Act. Amici does not dispute the reasonableness of construing "intangible" property within the ambit of Hobbs Act "property." It is a non sequitur to conclude, however, that an extortionist need not "obtain" those intangible property rights to be held liable under the Hobbs Act. If the defendants in *McMonagle* actually appropriated clinic services for themselves or for the benefit of a third party, then it would have been appropriate to hold them liable under the Hobbs Act, and therefore RICO. That did not happen. The Third Circuit's lack of analysis created the unjust result in which the defendants were deemed extortionists for simple trespass.

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[40] *See* Note, *Protestors, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. at 691 n. 157. At trial, defendants' counsel also objected to a proposed jury instruction that did not properly reflect the New York Standard Criminal Jury Instruction requirement regarding the fact that to be liable of extortion, the alleged extortioner must do something more than merely cause an alleged victim to surrender property. This is invariably always the case in situations involving advocacy groups. *Id.*

[41] 255 F.2d 350 (3d Cir. 1958).

[42] 262 F.2d 272 (3d Cir. 1959).

In order to clarify the "obtaining" element of extortion under the Hobbs Act and to prevent further damage to the First Amendment, this Court should reverse the Seventh Circuit in *Scheidler* and construe extortion under the Hobbs Act to require an alleged extortionist to "obtain" property. Reversing *Scheidler* necessarily requires disapproval of cases such as *McMonagle* that ignored the requirement, together with cases such as *Scheidler* that misunderstood the requirement by relying on dicta from prior decisions.

If *Scheidler* is allowed to remain law, a pattern of litigation will continue that chills the constitutionally protected speech of both popular and unpopular social advocacy groups.[43] *Scheidler* will logically cause environmental advocacy groups to fall within the ambit of RICO. Groups such as Greenpeace routinely engage in activities similar to those alleged against the Petitioners in *Scheidler,* namely trespass, assault, and distasteful conduct. Hobbs Act extortion was intended to implicate something different and more insidious than this type of annoying behavior.

Animal advocacy groups such as People for the Ethical Treatment of Animals ("PETA") will likewise face the possibility of harsh civil and criminal penalties for

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[43] *See Palmetto State Medical Center v. Operation Life Line*, 117 F.3d 142 (4th Cir. 1997) (dismissing RICO claims against demonstrator defendants due to insufficient evidence without questioning whether RICO applied to the demonstrators at Plaintiff's clinic); *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999) (reasoning that a person has "obtained" property under the Hobbs Act when their conduct or threats cause a person to voluntarily give up their right to conduct a business free from threats of violence and physical harm).

benign protest activities.[44] PETA routinely uses methods similar to those of Petitioners in *Scheidler*. There is no logical reason why *Scheidler's* reasoning will not extend to their activities as well.

Amici, State of Alabama, point out that *Scheidler* will invariably begin a pattern of litigation against governmental actors that allege RICO violations stemming from traditional governmental functions such as land use permitting.[45] RICO will clearly implicate governmental actors if they are not required to "obtain" or "get" property, but instead simply interfere with the rights of another. There are federal statutes and[46] and constitutional provisions[47] that prevent governmental bodies from acting with impunity, and certain improper governmental activity will still remain subject to RICO.[48] However, these situations involve cases where governmental actors actually "obtained" property from a victim, not situations where someone's freedom of choice was limited, but where no one, either the extortionist or a third party, actually obtained

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[44] *See Jacques Ferber, Inc. v. Bateman*, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999).

[45] Amicus Brief of State of Alabama at 9.

[46] 42 U.S.C. § 1983.

[47] *See* U.S. Const. amends. V & XIV; *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955); *Palazzolo v. Rhode Island*, 533 U.S. 606 (1897).

[48] *See Evans v. United States*, 504 U.S. 255, 268 (1992) (finding RICO liability against certain county commissioners); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F. 2d 328, 341 (2d Cir. 1985) (*citing* the Hobbs Act in upholding an injunction against state attorneys general).

property.

Civil rights groups, such as the Southern Christian Leadership Conference ("SCLC") and the National Association for the Advancement of Colored People ("NAACP"), can expect RICO lawsuits if *Scheidler* remains the law. In an effort to achieve political or social ends, these groups have either used boycotts or demonstrations as means to those ends, as did the Petitioners in *Scheidler*. Under the peculiar notion of extortion announced in *Scheidler*, the SCLC and the NAACP can expect RICO lawsuits for their benign conduct if *Scheidler* remains the law.

If *Scheidler* is not reversed, the First Amendment will suffer great damage. By requiring an alleged extortionist to "obtain" property in order to violate the Hobbs Act, this Court will bring the Hobbs Act within its common law and New York law history, and at the same time salvage the right to free speech.

III. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully Submitted,

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